Supreme Court, U.S.
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No. 90-1935

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

NORMAN WILLIAMS AND SUSAN LEVINE,
Petitioners,

v.

STATE OF VERMONT AND WILLIAM H. CONWAY, JR., COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES,
Respondents.

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents take a double tack in seeking to defeat certiorari. They begin by asserting that the tax at issue has been administered constitutionally, Brief in Opposition at 1, 6, even though this Court has already held that their "say-so" will not suffice. Williams v. Vermont, 472 U.S. 14, 21 (1985).[1] They next engage in a legal discussion which manages to miss every point raised by the certiorari petition. In particular, Respondents: a) ignore the distinction between tax refunds and legal damages; b) assert without authority that a wholly-discretionary administrative "remedy" can satisfy due process, even though the remedy has already been denied to Petitioner and declared futile by Respondents themselves; and c) rely on a discredited

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[1] Respondents also disparage Petitioner Williams for attempting to obtain an injunctive and declaratory relief before paying the tax, Brief in Opposition at 2-3, even though Respondents have argued for the past five years that they are not required to refund unconstitutional taxes under "sovereign immunity." Id. at 2; cf. Vermont supreme court decision at Petition 5a, 15a-17a.

notion of "interstate commerce" to avoid Petitioners' claim that the internal consistency or fair apportionment test should be applied to sales and use taxes.

In short, nothing in Respondents' Brief suggests that certiorari should be denied. The following points deserve particular emphasis:

1. The Vermont supreme court on remand dismissed this action on the pleadings for the second time. It did not do so because of any defect in the complaint. Remarkably, it dismissed the case because this Court said that the complaint stated a cause of action and that a factual determination would be required. That factual determination, the Vermont supreme court said, could only be sought in an independent administrative proceeding. It was not available in state court.

In reaching its conclusion, the state supreme court ruled that no cause of action is available under section 1983 or the federal Constitution for suits which seek tax refunds or other equitable relief. (App. 5a-9a.) It also held that declaratory relief is foreclosed once a tax has been paid, even where it is paid to avoid criminal and civil sanctions. (App. 17a-23a.) The state court thus refused to make the factual determination which this Court deemed essential to save the tax. In the meantime, Respondents continue to collect the tax in the amount of $1 million annually. (App. 61a.)

2. In dismissing, the Vermont supreme court relegated Petitioners to a second administrative request for refund before the commissioner of motor vehicles. (App. 14a-15a; 17a.)[2] Petitioner Williams already made such a request at the outset without success, and

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[2] The Court raised but did not answer the question of whether such a request would be barred by the statute of limitations. (App. 13a n.10.)

Respondents conceded in a brief to the state supreme court that further efforts would be futile. (App. 49a.) Moreover, the state court held that the commissioner had properly denied Petitioner Williams' refund request the first time because he could not consider constitutional claims. (App. 13a.) Nevertheless, the court said Petitioners' only recourse was to ask again. (App. 14a-15a.)

3. Under Vermont law, the commissioner of motor vehicles may deny a refund request without providing any hearing whatsoever. In fact, he has regularly denied motor vehicle purchase and use tax refund requests based on constitutional claims without providing a hearing after this Court's decision in this case. (App. 60a) (citing examples). If the Commissioner does elect to provide a hearing, he has complete discretion as to whether and to what extent to take evidence, allow discovery, or observe procedural

rules. See App. 12a-15a. Respondents do not dispute these points in their Brief in Opposition.

Respondents assert only that a right to judicial review in state court is available from the decision of the commissioner, relying on In Re Kelscot, Ltd., 152 Vt. 579, 568 A.2d 378 (1989). Cf. Brief In Opposition at 9. The case is inapposite. It involved a different tax and a different statute. The crucial distinction is that Kelscot was a "contested case," as to which judicial review is expressly provided by the Vermont Administrative Procedure Act, Vt. Stat. Ann. tit. 3, §815. It was a "contested case" precisely because an administrative hearing was required by statute. As the court explained, "the legal rights of Kelscot were determined by the Department [of Motor Vehicles], as required by law, after a hearing. 23 V.S.A. §3112." 152 Vt. at 581 (emphasis added). In the instant case, by contrast, no hearing is required by statute. The

Commissioner may conduct a hearing or not, as he so chooses. Consequently, the case is not "contested" and no right of appeal lies. See In re Marble Savings Bank, 137 Vt. 123, 400 A.2d 1022 (1979); Reed v. Department of Public Safety, 137 Vt. 9, 398 A.2d 301 (1979); Fitzpatrick v. Vermont State Retirement System, 136 Vt. 510, 394 A.2d 1138 (1978).[3]

4. Contrary to Respondents' assertion, the issue of whether state courts may refuse to hear constitutional tax claims under 42 U.S.C. §1983 is presented by this case, since it provides a possible

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[3] In the instant case, Petitioner Williams took the steps specified by the Vermont Rules of Civil Procedure for perfecting an appeal. He filed an original complaint seeking a tax refund in the state superior court after his refund request was denied by the commissioner. This procedure is set forth in Rule 75, V.R.Civ.P., for appeals from agency rulings where no other appeal procedure is specified by statute. Like the federal rules, the state rules of civil procedure require only a "short and plain statement of the claim." Rule 8, V.R.Civ.P. See also Burroughs v. West Windsor Board of School Directors, 141 Vt. 234, 446 A.2d 377 (1982) (recitation of Rule 75 not required to perfect appeal). The state supreme court nonetheless held, without any explanation, that this case "never originated" from the commissioner. (App. 47a.)

grounds for affirmance. See Revere v. Massachusetts General Hospital, 463 U.S. 239, 244 n.6 (1983); Dandridge v. Williams, 397 U.S. 471, 475-76 n.6 (1970). The Vermont supreme court held, as a matter of federal law, that no cause of action for a tax refund or other equitable relief is available under 42 U.S.C. §1983 or the Fourteenth Amendment. It also held that declaratory relief is foreclosed by state law. As Petitioners have argued, the state court's conclusions with respect to federal law deserve this Court's review. See Petition for Writ of Certiorari at 21-23. As to declaratory relief, the state court and Respondents are surely wrong to suggest that the issue is one of state law. Cf. Brown v. Western Railway Co. of Alabama, 338 U.S. 294 (1949) (federal remedy cannot be precluded by state rules). As Petitioners have pointed out, under federal law declaratory relief is available after taxes have been paid. Petition at 22.

5. Respondents' contention that the Commerce Clause is not implicated because the items subject to tax were not "in transit when they were taxed," Brief in Opposition at 11, was expressly repudiated by this Court in Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 322 (1977). See also D. H. Holmes Co. v. McNamara, 486 U.S. 24, 27 (1988). The issue of whether a state sales and use tax which fails to grant a tax credit for sales taxes paid in other states violates the Commerce Clause is squarely presented by this case. It should be resolved by this Court, especially in view of the affirmance last term by an equally-divided Court in Ford Motor Credit Co., Inc. v. Department of Revenue, 59 U.S.L.W. 4450 (May 21, 1991).

6. Respondents' attempts to convince this Court that the Vermont motor vehicle purchase and use tax was administered constitutionally only point up the need for a judicial determination of the facts. Cf. Brief

in Opposition at 4 and Respondents' Appendix at 25a-35a. That is what this Court remanded for in the first place. Petitioners will resist the temptation to refute Respondents' evidence here. Suffice it to say they are confident they will prevail at any hearing which meets due process standards.[4]

Respectfully submitted,

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[4] As noted in the Petition, however, this case could be disposed of by a ruling in favor of Petitioners on their Commerce Clause claim. No disputed factual issues are presented there. See Petition at 27-30. In view of the judicial resources expended and the delays endured to date, such a disposition may be appropriate.